

NOT FOR PUBLICATION

[Docket Nos. 67 & 68]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

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BP PRODUCTS NORTH AMERICA  
INC.,

Plaintiff,

v.

TOP SPEED GAS, LLC, et al.,

Defendants.

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Civil No. 06-0465 (RMB)

**OPINION**

**Appearances:**

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**BUMB**, United States District Judge:

This matter comes before the Court upon a motion by the  
defendants Top Speed Gas, LLC and Top Enterprise, LLC (the

"Defendants") to vacate the default judgment ordered by this Court on January 4, 2008. Defendants are corporate entities controlled by co-defendant Mehmet Top that occupy two properties on which gas stations are located. Plaintiff BP Products North America, Inc. (the "Plaintiff"), a corporate entity that sells motor fuel and other petroleum products, opposes Defendants' motion to vacate the default judgment on the grounds that Defendants have no possibility of success on the merits, the default resulted from Defendants' own culpable conduct, and Plaintiff would be prejudiced if required to continue litigating this matter. Because the Court agrees that Defendants lack any legitimate defense on the merits, it denies Defendants' motion to vacate the default judgment.

### **I. Statement of Facts**

Co-defendant Mehmet Top operated two gas stations that are the subject of this lawsuit, which were located, respectively, on Kings Highway in Cherry Hill, New Jersey (the "Cherry Hill Station") and on Route 130 in Brooklawn, New Jersey (the "Brooklawn Station"). In one transaction, the terms of which were set out in a sale agreement consummated in July 2001, Defendants purchased the two properties from Plaintiff; they purchased Plaintiff's interest in fee simple to the Cherry Hill Station for \$601,101, and Plaintiff's leasehold interest in the

Brooklawn Station for \$250,000.<sup>1</sup> The parties agreed that, as consideration for these property transactions, Defendants would sell only Plaintiff's brand of motor fuel and petroleum products at these sites for a period of ten years. This promise was codified in the sale agreement, as well as in restrictive covenants enumerated in the deed of sale for the Cherry Hill Station and the lease assignment agreement for the Brooklawn Station. Plaintiff subsequently entered into five-year-term gasoline supply agreements with Top Speed for the Cherry Hill Station in October 2001, and with Top Enterprise for the Brooklawn Station in November 2001.

Around October 2005, as a result of a steep increase in gasoline prices attributable to the devastation wrought by Hurricanes Katrina and Rita, Top Enterprise stopped payments to Plaintiff for \$60,000 of fuel it had already purchased. At that time, Top Speed and Top Enterprise refused to purchase any additional fuel from Plaintiff. Plaintiff sent Defendants notice of their failure to comply with the supply agreements and the restrictive covenants, and offered an opportunity to cure the defaults. Plaintiff subsequently terminated Defendants' respective supply agreements and removed its trademarks and logos

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<sup>1</sup> The sale agreement was later amended to specify that Top Enterprise, LLC would lease the Brooklawn Station and Top Speed Gas, LLC would purchase the Cherry Hill Station. Mr. Top controlled both entities.

from the two stations. Plaintiff alleges, and this Court previously found as fact, that around late December 2005 or early January 2006, Defendants began selling gasoline from another supplier at the Cherry Hill Station.<sup>2</sup>

Plaintiff filed this lawsuit on February 1, 2006 and this Court issued an order on February 23, 2006 temporarily restraining Defendants from selling non-BP gasoline at the Cherry Hill Station. In May 2007, the Court granted the motion of Defendants' counsel to withdraw from the case, which was the apparent result of Mr. Top's dissatisfaction with the attorney's representation and his accompanying refusal to pay the attorney's fees. [Docket No. 30.] When the Court granted this motion, it warned Defendants that a new attorney must enter an appearance before July 2, 2007 or default would be entered against them. Since no substituting attorney had entered an appearance, on July 27, 2007, the Court ordered Mr. Top to appear pro se at the next status conference, to be held on September 7, 2007, which he did. On several occasions [e.g., Docket Nos. 35, 38], the Court informed Mr. Top that Top Speed Gas, LLC, and Top Enterprise,

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<sup>2</sup> Defendants' statement that "Top Speed never sold non-BP products at the Cherry Hill Premises" (Def. Br. at 8) is curious, since Defendant admitted to this Court in a previous proceeding that he "had no other option than to begin selling unbranded gasoline [at the Cherry Hill Station]. It was a matter of financial survival." BP Products North America, Inc. v. Top Speed Gas, LLC, slip op., Civ. No. 06-465 (D.N.J. Feb. 23. 2006) (TRO Opinion).

LLC, as corporate entities, had to obtain counsel under pain of default, since they could not be represented by Mr. Top acting pro se. As no counsel had entered an appearance by November 28, 2007, the Court ordered the Clerk to enter default against the two corporate Defendants on that date. [Docket No. 39.]

Plaintiff subsequently moved for a default judgment against Top Speed Gas, LLC and Top Enterprise, LLC [Docket No. 41], which the Court granted on January 4, 2008. [Docket Nos. 42 and 43.]

On March 31, 2008, Plaintiff moved for summary judgment on the remaining claims, in particular the claims against Mr. Top and all counterclaims. That same date -- 10 months after the Court granted the motion of Defendants' attorney to withdraw and almost three months after the entry of default judgment -- the Court received notice that Defendants had retained new representation. Defense counsel timely filed a brief responding to Plaintiff's motion for summary judgment on May 5, 2008. More than a month later, on June 16, 2008 -- nearly six months after the entry of default and nearly three months after the new counsel had been retained -- Defendants filed this motion to vacate the default judgment pursuant to Federal Rule of Civil Procedure 60(b). The Court heard argument on the summary judgment motion on June 20, 2008, and denied the motion without prejudice in light of the pending motion to vacate the default judgment. The Court addresses that motion herein.

## II. Legal Standard

Federal Rule of Civil Procedure 60(b) permits parties to petition federal courts for relief from final judgments. When deciding whether to set aside a default judgment in particular, district courts are guided by a three-part test. They must consider: (1) whether the plaintiff will be prejudiced if the default judgment is set aside; (2) whether the defendant has a meritorious defense; and (3) whether the default was the product of the defendant's culpable conduct. Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987).

Although district courts are urged to make explicit findings concerning these factors in considering a motion to vacate a default judgment, id., the second factor -- whether the defendant has a meritorious defense -- is a "threshold question," since "there would be no point in setting aside the default judgment and remanding for a . . . hearing [on the merits] if [the moving party] could not demonstrate the possibility of his winning." U.S. v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984). The showing of a meritorious defense is accomplished when "allegations of defendant's answer, if established on trial, would constitute a complete defense to the action." Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951).

Decisions to set aside default judgments are left to the discretion of the district court, but doubtful cases should be

resolved in favor of the party moving to set aside the default judgment so that cases, when possible, may be decided on their merits. \$55,518.05, 728 F.2d at 194-95.

### **III. Discussion**

#### **A. Meritorious Defense**

The Court first considers the "threshold question" of whether Defendants have a meritorious defense, which would, if established on trial, constitute a complete defense to the action. \$55,518.05, 728 F.2d at 195.

As a preliminary matter, the Court notes that Defendants' moving brief does not even argue the existence of a meritorious defense as to the failure of Top Enterprise to make payments on purchased gasoline.<sup>3</sup> The Court therefore understands Defendants' submission as arguing only that there exist meritorious defenses to the alleged breach of contractual duties contained in the deed of sale for the Cherry Hill Station and the lease assignment

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<sup>3</sup> In their Reply Brief, Defendants make a perfunctory attempt at preserving the applicability of their motion to this monetary issue by reciting a few conclusory sentences (only after Plaintiff's Opposition Brief noted the absence of argumentation on these issues). (Def. Resp. Br. at 12.) The Court is not persuaded by this superficial effort. However, to the extent Defendant seeks to challenge the Court's calculation of attorney's fees awarded in the judgment, the Court leaves open the possibility that Defendants may, pursuant to Rule 60, move to modify the fee award contained in the judgment. See, e.g., Weitzman v. Stein, 908 F. Supp. 187 (S.D.N.Y. 1995).

agreement for the Brooklawn Station. Since the existence of a meritorious defense is a "threshold question" when considering a motion to vacate a default judgment, the Court will, without further discussion, deny Defendants' motion as to the monetary portion of the default judgment.

Defendants argue that the default judgment should be vacated because there exist meritorious defenses to the alleged breach of the restrictive covenants contained in the deed of sale for the Cherry Hill Station and the lease assignment agreement for the Brooklawn Station. The Court will address each in turn.

### **1. Cherry Hill Station**

Defendants do not dispute that they agreed to sell only Plaintiff's brand of petroleum products when they assented to a restrictive covenant contained in deed of sale. Defendants argue, however, that the restrictive covenant is now unenforceable, since the covenant's terms are unreasonable.

Restrictive covenants to refrain from competitive practices are enforceable, if reasonable. 3 Milton R. Friedman, Friedman on Leases § 28:1 (Patrick A. Randolph, Jr., 5th ed., 2008); see also Davidson Bros., Inc. v. D. Katz & Sons, Inc., 121 N.J. 196, 579 A.2d 288 (1990). "Covenants against competition that are tied to ownership of a particular parcel of land are seldom unreasonable because the impact is limited to one piece of land." Restatement (Third) of Property § 3.6 cmt. b. To determine



whether a particular restrictive covenant is reasonable, the Supreme Court of New Jersey has set out an eight-factor test. Courts should consider: (1) whether the parties intended to interfere with existing commercial laws, (2) whether the covenant's value made the exchange of considerations inequitable, (3) whether the covenant clearly expresses its restrictions, (4) whether the covenant was in writing and whether the burdened party had actual notice of it, (5) whether the covenant is reasonable concerning area, time, or duration (and does not extend for perpetuity), (6) whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor, (7) whether the covenant interferes with the public interest, and (8) whether changed circumstances now make the covenant unreasonable. Id. at 211.

Defendants appear to concede that most of these factors weigh in favor of a determination that the restrictive covenant at issue here is reasonable. Defendants argue only that the covenant violates federal anti-trust laws and is unreasonable because it does not run with the land.<sup>4</sup>

Even if, *arguendo*, the Court did hold the restrictive

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<sup>4</sup> Defendants also remark that "the Court must decide" whether the exchange of considerations was equitable. [Def. Mot. Br. at 31.] Defendants offer no reasons why the Court might determine the exchange of considerations to be unreasonable, however. Based on the information before it, the Court has no reason to doubt the fairness of the exchange of considerations for which Defendants and Plaintiff bargained.

covenant to belie the policies of federal anti-trust law, it doubts that this factor alone would outweigh the other seven. Nonetheless, the Court does not find the restrictive covenant to violate anti-trust policies. If Defendants' argument were correct, then any covenant requiring that a property be used to sell none other than a particular brand would violate anti-trust law. This logical consequence of Defendants' argument is inconsistent with established law. See Restatement (Third) of Property § 3.6 cmt. c ("Tying arrangements, which require the purchase of a second product or service as a condition of purchasing the first, . . . [have] c[o]me to be widely accepted.") (addressing petroleum product sales in particular); Trosper v. Shoemaker, 227 S.W.2d 176 (Ky. 1949) (upholding a petroleum product tying arrangement); Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 45 N.W.2d 316 (Mich. 1951) (upholding a petroleum product tying arrangement); see generally Acme Markets, Inc. v. Wharton Hardware and Supply Corp., 890 F.Supp. 1230, 1242 (D.N.J. 1995) ("[New Jersey courts] recognize that it is not unreasonable for parties in commercial-property transactions to protect themselves from competition by executing noncompetition covenants. . . . [R]ather than limiting trade, in some instances, restrictive covenants may increase business activity.").<sup>5</sup>

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<sup>5</sup> The Court need not reach the question of whether the restrictive covenant is a "tying arrangement." Plaintiff argues that it is not, because Defendants are not required to sell Plaintiff's brand of gasoline; they are only barred from selling

Defendants' other argument, that the restrictive covenant is unreasonable because it does not "touch and concern" the land, is equally unavailing. The Supreme Court of New Jersey has departed from this "esoteric" test. Davidson, 579 A.2d at 295 ("Rigid adherence to the 'touch and concern' test as a means of determining the enforceability of a restrictive covenant is not warranted. Reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law."). Defendants have not articulated why the "touch and concern" analysis is relevant to the reasonableness of the particular restrictive covenant at issue here. As such, the Court finds that further discussion is unnecessary, because a determination that the restrictive covenant does not "touch and concern" the land would not alter its conclusion on the covenant's reasonableness.

The Court therefore concludes that, applying the eight Davidson factors, the restrictive covenant limiting sales to Plaintiff's brand petroleum products for a ten-year term is reasonable. For this reason, there exists no meritorious defense to Defendants' breach of the covenant's terms at the Cherry Hill Station.

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other brands of gasoline. (Defendants could, in compliance with the covenant, operate another sort of business altogether on the properties.) (Pl. Op. Br. at 28.) The Court merely holds that the restrictive covenant, whether or not a tying arrangement, is well within the range of permissible covenants.

## **2. Brooklawn Station**

Also here, Defendants do not dispute that they agreed to sell only Plaintiff's brand of petroleum products when they assented to a restrictive covenant contained in the lease assignment agreement for the Brooklawn Station. They argue, however, that Plaintiff cannot enforce the restrictive covenant, since Plaintiff does not retain any reversionary interest in the Brooklawn Station property.

Defendants assert that restrictive covenants are never enforceable by assignors when contained within a contract to completely assign a leasehold interest, since the assignor does not retain any reversionary interest in the property under these circumstances. This proposition of law is patently incorrect. In fact, Courts frequently enforce these sorts of restrictive covenants. See, e.g., BP Products North America v. Motor Parkway Amoco, et al., slip op., Civ. No. 06-0833 (E.D.N.Y. Aug. 21, 2006); Al-Madinah Petroleum, Inc. v. Manjee, 521 S.E.2d 681 (Ga. App. 1999).

Defendants' premise is correct that there is no privity of estate between an assignor and an assignee, and thus the assignor retains no possessory interest in the property. 1 Milton R. Friedman, Friedman on Leases § 7:5.3 (Patrick A. Randolph, Jr.,

5th ed., 2008). Nonetheless, there is privity of contract between assignor and assignee. For this reason, the tenant-assignor may assign its leasehold interest for "substantial consideration," and may enforce the assignment contract at law for damages (although it may not repossess the premises). Id. In this case, Plaintiff assigned its leasehold interest in the Brooklawn Station in exchange for the consideration that Defendants would sell only Plaintiff's brand of petroleum products. Although Plaintiff could not, if it wanted to, enforce this agreement by evicting Defendants from the premises, it may seek damages for breach of contract.<sup>6</sup>

The cases cited by Defendants in support of their position are inapposite. In Groth v. Continental Oil Co., 373 P.2d 548 (Id. 1962) and in Berkeley Development Co. v. Great Atlantic & Pacific Tea Co., 214 N.J. Super. 227, 518 A.2d 790 (1986), the two primary cases on which Defendants rely, the restrictive covenants at issue were in the original leases and the disputes were over whether the assignee was subject to the restriction to which the assignor had assented. Here, by contrast, the

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<sup>6</sup> If lease assignment contracts were not enforceable by assignors, as Defendants argue, then assignors could never seek indemnification for an assignee's non-payment of rent. As is well established, if an assignee fails to pay rent, the assignor remains liable to the landlord; however, because the assignor and assignee are in privity of contract, the assignor can seek indemnification from the assignee. Friedman, supra, at § 7:5.1. This illustrates that Defendants' premise -- that an assignor has no enforceable rights under the assignment contract -- is clearly incorrect.

restriction is contained in an instrument the assignor and assignee both assented to -- the assignment contract -- and not in some preexisting instrument. None of the cases cited by Defendants hold that a restrictive covenant contained within a lease assignment contract is unenforceable by the assignor.

Thus, because the restrictive covenant in the lease assignment contract is not unenforceable, and is reasonable for the same reasons articulated as to the Cherry Hill Station, the Court finds that the defenses asserted by Defendants as to the Brooklawn Station lack merit.

#### **B. Prejudice and Culpability**

Because the matter of whether Defendants have a meritorious defense is a "threshold question," the Court need not reach the other two factors, namely whether Plaintiff will be prejudiced if the judgment is set aside and whether the default was the product of Defendants' own culpable conduct, in ruling on a motion to vacate a default judgment. U.S. v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984). Nonetheless, the Third Circuit has urged district courts to make explicit findings concerning these factors when considering a motion to vacate a default judgment. Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987).

First, the Court finds that Plaintiff would be minimally prejudiced if the judgment was set aside. Contrary to

Plaintiff's submission, "[d]elay in realizing satisfaction on a claim rarely serves to establish [a sufficient] degree of prejudice." Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc., 175 Fed. Appx. 519, 523 (3d Cir. 2006) (quoting Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656-57 (3d Cir. 1982)). Nonetheless, the substantive legal questions discussed in Part A of this OPINION were ripe for litigation more than a year ago. The Court agrees with Plaintiff that requiring it to litigate this case from "ground zero" would work an unfairness upon it. (Pl. Op. Br. at 33-34.) The Court is mindful, however, that the usual indicia of serious prejudice are absent here, such as a hindered ability to pursue the claim, loss of evidence, increased potential for fraud or collusion, or substantial reliance upon the judgment." Id. at 524.

Second, the Court finds that the default was the product of Defendants' own culpable conduct. Defendants portray Mr. Top as an innocent party who ran out of time while struggling to retain counsel and who did not understand the effect of a default judgment. In fact, the Court received the motion of Defendants' first attorney to withdraw from the case on February 15, 2007, almost a full year before the Court entered the default judgment on January 4, 2008. When the Court finally granted the attorney's motion on May 29, 2007, it explained that the "irretrievable breakdown of the attorney-client relationship" was caused by Mr. Top's dissatisfaction with his attorney's

representation and accompanying refusal to pay his attorney's fees. [Docket No. 30.] Although one might expect that Mr. Top would already have sought replacement representation by this date, the Court ordered Defendants to secure new representation, on pain of default, by July 2, 2007. In numerous subsequent communications with Mr. Top, the Court explained that default would result if the corporate defendants were not represented by counsel. Magistrate Judge Schneider explained to Mr. Top the effect of a default judgment at the status conference held on September 7, 2007 (Mr. Top was accompanied by his daughter, who spoke on his behalf):

JUDGE SCHNEIDER: Under the rules of the Court, a corporation cannot represent itself. So unless Top Speed Gas LLC and Top Enterprise LLC get attorneys to represent them, a default is going to be entered against them.

MS. TOP: What is a default?

JUDGE SCHNEIDER: A default means that a judgment will automatically be entered in favor of the Plaintiff.

MS. TOP: OK, so that means that we cannot represent ourselves and we need to get a lawyer?

JUDGE SCHNEIDER: Mr. Top can represent himself. He is a defendant in this case.

MS. TOP: Oh, so there are three defendants?

JUDGE SCHNEIDER: Yes. There are three defendants: the two companies and Mr. Top. Mr. Top, your dad, can represent himself, but he cannot represent the two companies.

MS. TOP: OK.

JUDGE SCHNEIDER: Unless the two companies get a lawyer, a default is going to be entered against them and that means that they don't have a defense to any of the claims.

[Docket No. 35 (audio recording).] Mr. Top communicated with the Court directly and through his daughter during the proceedings.



If he did not understand before September 7, 2007, he should have understood thereafter that default would result if the two corporate defendants continued to be unrepresented.

The Clerk entered default on November 28, 2007 and the Court granted Plaintiff's motion for default judgment on January 4, 2008. Defendants did not retain new counsel until March 31, 2008, and Defendants' new attorney waited nearly three months after that, until June 16, 2008, before filing the motion to vacate the default judgment.

Based on the numerous warnings received by Mr. Top and his persistent refusal to retain an attorney, the Court finds that Defendants willfully and in bad faith ignored the Court's repeated entreaties to retain counsel.

#### **IV. Conclusion**

For the aforementioned reasons, Defendants' motion to vacate the default judgment is denied. An appropriate Order will issue this date.

Dated: October 23, 2008

s/Renée Marie Bumb  
RENÉE MARIE BUMB  
UNITED STATES DISTRICT JUDGE